

TRUST LAW

Govt ups the ante on trustee tax disclosure

By Anthony Grant

Last December, the government enacted some important changes to the tax legislation which took effect on 1 April.

The changes empower the IRD to obtain extensive information about trusts including profit and loss statements, balance sheets, loans, distributions, settlements, people who have powers of appointments and the names, IRD numbers and dates of birth of settlors.

It's a sea-change in the government's approach to trusts.

The legislation has ostensibly arisen from its decision to increase the top rate of income tax to 39% on income above \$180,000 on 1 April. The government wants to know if the increase in the top tax rate is being circumvented by using trusts.

Critics say the government is seeking much more information than is needed to answer that simple question and they're right. Of course the government is seeking more information than is needed to answer that question.

But should the government be going down this path? My response is that like it or not, the days of 'soft' regulation of trusts and companies are coming to an end. We are now in a new era that is called by those who don't like it 'the transparency bandwagon'.

Here are some of the arrangements that have been, and are being, implemented internationally, most of which are known by unpronounceable acronyms.

FATCA

New Zealand has entered into a FATCA (Foreign Account Tax Compliance Act) Intergovernmental Agreement with the USA under which information must be provided to the IRD. The purpose is to detect the assets of American individuals. Senator Carl Levin, who was a strong promoter of the legislation in the USA, believes the US Treasury was losing as much as US\$100 billion annually as a result of 'offshore tax non-compliance'.

FATF

Both the OECD and the World Bank are involved with FATF (Financial Action Task Force) which tries to increase the transparency of beneficial ownership.

The G20 principles

In 2014, members of the G20 endorsed a number of principles to counter money-laundering and counter-terrorism, focusing on companies.

They state that companies should ensure competent authorities have timely access to adequate, accurate and current information about the beneficial ownership of legal persons.

AUSTRAC

This is an Australian regime that can obtain information about the beneficial ownership of trusts.

The AML/CFT regime

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 in New Zealand requires information about beneficial ownership to be disclosed. Australia enacted its AML legislation in 2006.

PSC

The UK is establishing registers of beneficial owners of companies, land-owning entities and trusts. A register of People with Significant Control (its acronym is PSC) has been available since 2016.

All British overseas territories and Crown dependencies were supposed to have introduced Public Company Beneficial Ownership Registers but this has been delayed until 2022-2023.



Anthony Grant

Member states of the EU were required to introduce public company beneficial ownership registers by January 2020 but as of March 2020 most countries had not done so.

4MLD and 5MLD

The EU published a 'Fourth Money Laundering Directive' (its acronym is 4MLD) which came into effect in 2017. This requires all trusts with a UK tax liability to register, whether the trustees are resident in the UK or not.

The EU has since implemented a 'Fifth Money Laundering Directive' (5MLD) requiring all UK trusts to register, whether or not they have tax liabilities; to provide information about their beneficial owners; to register if they enter into a business relationship with a UK service provider and to report if they have acquired UK real estate.

Non-UK/EU trusts with UK tax liabilities will be required to register, as will non-UK/EU trusts which acquire UK real estate. The trustees must provide information about the trust assets, including their value, the place where the trust is resident/administered and information about each of the 'beneficial owners of the trust', together with other information.

And look how widely the authorities have defined the term 'beneficial owner'. It includes settlors, trustees, beneficiaries and people who hold certain powers of appointment in the trust and even people who are named in a letter of wishes as a potential beneficiary.

Why are all these initiatives and others being implemented? The answer the regulators give is that the information is needed to suppress crime, money-laundering, bribery, insider dealing, tax fraud, terrorism funding and corruption.

Even the most sceptical observer would conclude that centuries of trust secrecy are coming to an end. Governments everywhere are testing the boundaries of information that they can require people to disclose.

Anthony Grant is an Auckland barrister specialising in trusts and estates and is a presenter at the *Cradle to Grave™ Conference* ❖